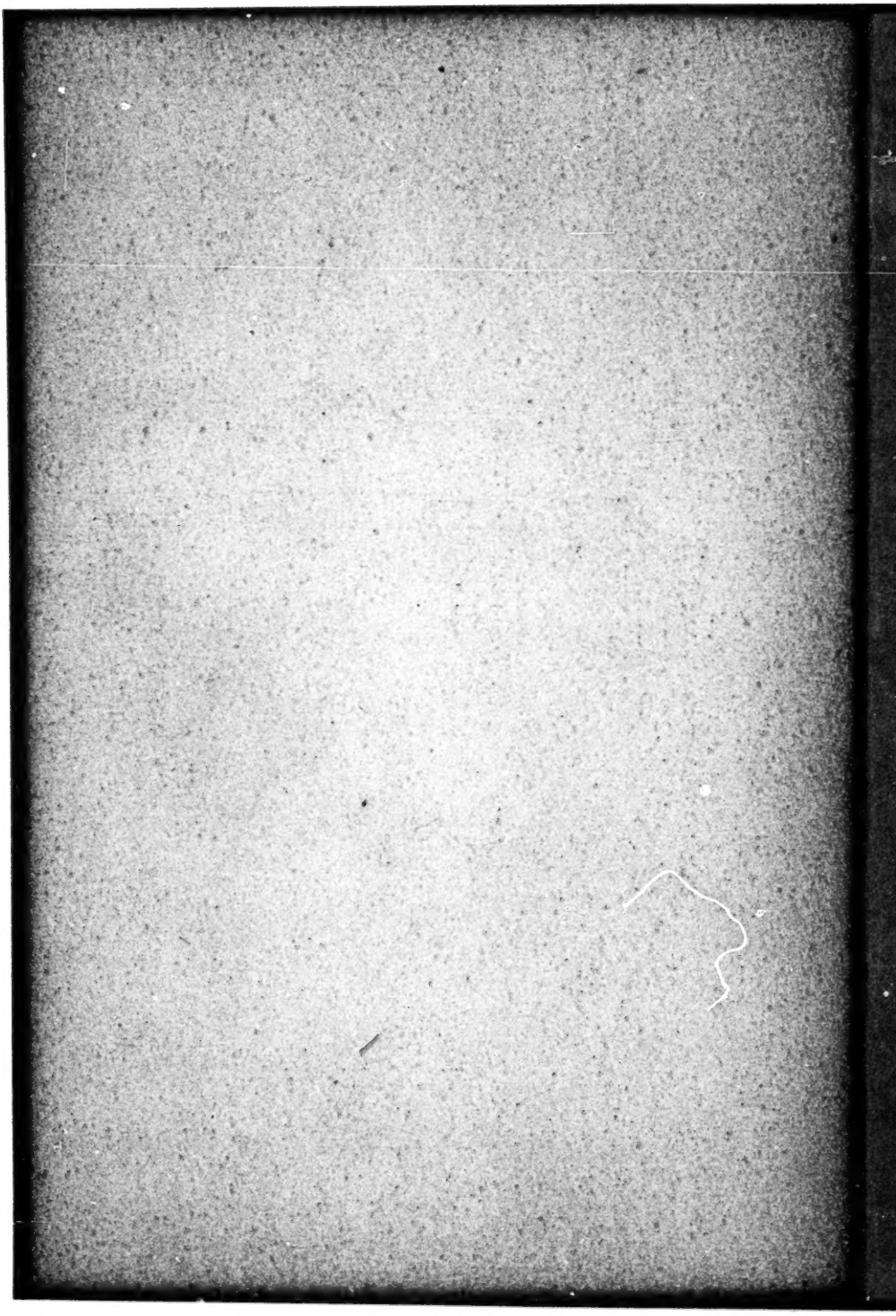


IN THE

Supreme Court of the United States

October Term, 1973

No. 73-[illegible]

NORVAL COSS, et al.,
Appellants

—v—

EILEEN LOPEZ, et al.,
Appellees

On Appeal from a Three-Judge
United States District Court
for the Southern District of Ohio,
Eastern Division

BRIEF BY

The Buckeye Association of School Administrators,
The Ohio Association of Secondary School Principals,
The Ohio Association of Elementary School Principals,
The Ohio Association of School Business Officials,
The Ohio School Superintendents Association,
The Ohio Association of School Curriculum Directors,
The Ohio Congress of School Administration Association,
as *Amici Curiae* in support of the constitutionality
of Ohio Revised Code Section 3313.66

Squire, Sanders and Dempsey,
John F. Lewis
Baruch F. Jones
C. Christopher Mayer
1900 Union Commerce Building
Cleveland, Ohio 44115
216-696-9300

TABLE OF CONTENTS

	Page
IDENTIFICATION AND PURPOSE OF AMICI CURIAE	1
DISCUSSION	
I. Public Classroom Instruction Is Not An Interest Protected By The United States Constitution	2
II. Suspensions Not To Exceed Ten Days Do Not Interfere With Education And The Absence From Classroom Learning Cannot Be Shown To Constitute A Grievous Loss	8
III. Student Disruptions Create An Emergency In The Educational Process Requiring A Flexible Response From Teachers And School Administrators	11
CONCLUSION	18
APPENDIX A — The Federal Courts Have In General Upheld The Constitutionality Of Short-Term Suspensions Although Neither Prior Notice Nor Prior Hearing Was Provided. Cases Upholding Suspensions Are Set Forth Chronologically From 1969 Through 1973	18
APPENDIX B — Summary Of Suspensions For The School Year 1972-1973 For The Cincinnati City School District	23

TABLE OF AUTHORITIES

Cases:

	Page
Baker v. *Downey City Board of Education*, 307 F.Supp. 517 (C.D. Cal. 1969)	18, 19
Banks v. *Board of Public Instruction of Dade County*, 314 F.Supp. 285 (S.D. Fla. 1970), *vacated*, 401 U.S. 988 (1971), *aff'd per curiam*, 450 F.2d 1103 (5th Cir. 1971)	12, 13, 14, 20
Black Coalition v. *Portland School District No. 1*, 484 F.2d 1040 (9th Cir. 1973)	21, 22
Bell v. *Burson*, 402 U.S. 535, 91 S.Ct. 1586, 29 L.Ed.2d 90 (1971)	14
Board of Regents of State Colleges v. *Roth*, 408 U.S. 564, 92 S.Ct. 2701, 33 L.Ed.2d 548 (1972)	4, 11
Bolling v. *Sharpe*, 347 U.S. 497, 74 S.Ct. 693, 98 L.Ed. 884 (1954)	7
Brown v. *Board of Education*, 347 U.S. 483, 74 S.Ct. 686, 98 L.Ed. 873 (1954)	7
Cleveland Board of Education v. *LaFleur*, U.S. , 94 S.Ct. , 39 L.Ed. 2d 52 (1974)	15
Connelly v. *University of Vermont and State Agricultural College*, 244 F.Supp. 156 (D.Vt. 1965)	15
Duncan v. *Louisiana*, 391 U.S. 145, 88 S.Ct. 1444, 20 L.Ed.2d 491 (1968)	5
Epperson v. *Arkansas*, 393 U.S. 97, 89 S.Ct. 266, 21 L.Ed.2d 228 (1968)	17
Farrell v. *Joel*, 437 F.2d 160 (2d Cir. 1971)	20
Gonyaw v. *Gray*, 361 F.Supp. 366 (D.Vt. 1973)	15
Hernandez v. *School District Number One, Denver, Colorado*, 315 F.Supp, 289 (D.Colo. 1970)	19

	Page
Jackson v. *Hepinstall*, 328 F.Supp. 1104 (N.D.N.Y. 1971)	20
Joint Anti-Fascist Refugee Committee v. *McGrath*, 341 U.S. 123, 71 S.Ct. 624, 95 L.Ed. 817 (1951)	9
Karr v. *Schmidt*, 401 U.S. 1201, 91 S.Ct. 592, 27 L.Ed. 2d 797 (1971)	16
Kelly v. *Metropolitan County Bd. of Ed. of Nashville, etc.*, 293 F.Supp. 485 (M.D. Tenn. 1968)	15
Laucher v. *Simpson*, 28 Ohio App.2d 195, 276 N.E.2d 261 (Ct.App. Knox Co., 1971)	10
Linwood v. *Board of Education, City of Peoria, School District No. 150, Illinois*, 463 F.2d 763 (7th Cir. 1972), *cert. denied* 409 U.S. 1027 (1972)	21
Meyer v. *Nebraska*, 262 U.S. 390, 43 S.Ct. 625, 67 L.Ed. 1042 (1923)	4
Morrissey v. *Brewer*, 408 U.S. 471, 92 S.Ct. 2593, 33 L.Ed.2d 484 (1972)	7, 8, 9
Palko v. *State of Connecticut*, 302 U.S. 319, 58 S.Ct. 149, 82 L.Ed. 288 (1937)	5
Phillips v. *Commissioner*, 283 U.S. 589, 51 S.Ct. 608, 75 L.Ed. 1289 (1931)	14
Poe v. *Ullman*, 367 U.S. 497, 81 S.Ct. 1752, 6 L.Ed.2d 989 (1961)	5
Roe v. *Wade*, 410 U.S. 113, 93 S.Ct. 705, 35 L.Ed.2d 147 (1972)	6
San Antonio School District v. *Rodriguez*, 411 U.S. 1, 93 S.Ct. 1278, 36 L.Ed. 2d 16 (1973)	6, 7, 8
Tate v. *Board of Education of Jonesboro, Ark. Special School District*, 453 F.2d 975 (8th Cir. 1972)	20, 21
Tinker v. *Des Moines Community School District*, 393 U.S. 503, 89 S.Ct 733, 21 L.Ed. 2d 731 (1969)	10

	Page
Waugh v. *Board of Trustees of the University of Mississippi*, 237 U.S. 589, 35 S.Ct. 720, 59 L.Ed. 1131 (1915)	17
Whitfield v. *Simpson*, 312 F.Supp. 889 (E.D. Ill. 1970)	19, 20
Constitutions and Statutes:	
Ohio Revised Code, § 3313.66	3, 9
U.S. Const. amend XIV, § 1	3
Other Authorities:	
Buss, *Procedural Due Process for School Discipline: Probing the Constitutional Outline*, 119 U. Pa. L. Rev. 545 (1971)	15

IN THE

Supreme Court of the United States

October Term, 1973

No. 73-898

NORVAL GOSS, et al.,
Appellants

v.

EILEEN LOPEZ, et al.,
Appellees

On Appeal from a Three-Judge United States District Court for the Southern District of Ohio, Eastern Division

BRIEF OF AMICI CURIAE

IDENTIFICATION AND PURPOSE OF AMICI CURIAE

Amici Curiae are among those groups and individuals who are professionally committed to the improvement of education in the public schools. They believe that such improvement can come about only through a process of experimentation and innovation involving the utilization of a variety of educational tools. Such experimentation and innovation are not possible in a situation where rigid constitutional formulas have been imposed upon the public schools.

One of the tools utilized in the educational process in Ohio is the short-term disciplinary suspension. The use of such suspensions is a part of education. It is vital both to the maintenance of an orderly process of education for all

who are in attendance in public schools and to the development of a sense of discipline and control in individual students. The importance of this tool is indicated by the following figures: in the Cincinnati School District in the school year 1972-3, there were 4,054 short-term suspensions out of a total student enrollment of 81,007; in the Akron City School District in the school year 1972-3, there were 7,352 short-term suspensions out of a total enrollment of approximately 57,000 students; and in the Cleveland City School District in the school year 1972-3, there were 14,598 short-term suspensions out of a total student enrollment of 142,053. These figures make absolutely clear that a constitutional requirement of a hearing prior to the short-term suspension of every student would render this basic tool unavailable. The time of administrators, teachers, and students consumed in hearings in this number of cases would obviously be enormous.

The importance of the student suspension device to the educational process in Ohio is related to the fact that Ohio's compulsory attendance law applies to students between the ages of 6 and 18 years. This is the longest period required by any state. States where there are fewer older students and different disciplinary problems may well find that the Ohio procedure is unnecessary, unsuitable or even undesirable. It is the position of *Amici Curiae* that such judgments are best left to the administrators, legislators and ultimately to the people of the various states. Only through a flexible process whereby individual states are allowed to utilize a variety of educational tools can the goal of an improved educational process be attained.

DISCUSSION

I. Public Classroom Instruction Is Not An Interest Protected By The United States Constitution.

Appellees were suspended from school under authority of a statute which provided:

> "The superintendent of schools of a city or exempted village, the executive head of a local school district, or the principal of a public school may suspend a pupil from school *for not more than ten days*. Such superintendent or executive head may expel a pupil from school. Such superintendent, executive head, or principal shall *within twenty-four hours* after the time of expulsion or suspension, *notify the parent* or guardian of the child, and the clerk of the board of education in writing *of such* expulsion or *suspension including the reasons therefor*. The pupil or the parent, or guardian, or custodian of a pupil so expelled may appeal such action to the board of education at any meeting of the board and shall be permitted to be heard against the expulsion. At the request of the pupil, or his parent, guardian, custodian, or attorney, the board may hold the hearing in executive session but may act upon the expulsion only at a public meeting. The board may, by a majority vote of its full membership, reinstate such pupil. No pupil shall be suspended or expelled from any school beyond the current semester. Ohio Revised Code, § 3313.66 (emphasis supplied).

Each suspension was for a period not to exceed ten (10) days. Neither notice nor a hearing was given prior to the suspensions.

Appellees would like the above statute declared unconstitutional. They persuaded the three-judge trial court that education is a "liberty" protected by the Due Process Clause of the Fourteenth Amendment and that a suspension constituted a deprivation from education.

In revelent part, Section I of the Fourteenth Amendment to the United States Constitution declares:

> "No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property without due process of law. . . ."

There is no claim that the Constitution explicitly protects education. Whether the Constitution implicitly

protects education as a "liberty" under the Due Process Clause is the threshold question for this Court. The three-judge trial court concluded education was a "liberty" but in so doing was careful to observe: "The Supreme Court has not resolved the question of whether a student's statutory right to an education is a liberty which is protected by due process of law." (Jurisdictional Statement, p. 55.)

Not every "interest" is entitled to due process. It is only those coming within the Fourteenth Amendment's protection of liberty and property. This Court reiterated this limitation in *Board of Regents of State Colleges* v. *Roth*, 408 U.S. 564, 92 S.Ct. 2701, 33 L.Ed. 2d 548 (1972) where Mr. Justice Stewart declared:

> "The requirements of procedural due process apply only to the deprivation of interests encompassed by the Fourteenth Amendment's protection of liberty and property. When protected interests are implicated the right to some kind of prior hearing is paramount. But the range of interests protected by procedural due process is not infinite." 408 U.S. at 569-70.

Attendance at public classroom instruction is not a protected interest. This conclusion is reached from a review of this Court's approach to determining the kinds of liberty interests which are entitled to due process protection.

Fourteenth Amendment "liberty" is something more than exemption from physical restraint. Thus, it was established in *Meyer* v. *Nebraska*, 262 U.S. 390, 43 S.Ct. 625, 67 L.Ed. 1042 (1923), that a blanket prohibition against the teaching of German constituted an infringement on the teacher's "liberty" to teach and the "liberty" of parents to obtain such teaching. The test suggested by the Court was whether the interest for which protection was sought was a privilege ". . . long recognized at common law as *essential* to the orderly pursuit of happiness by free men." 262 U.S.

at 399 (emphasis supplied). This test was amplified by Mr. Justice Cardozo in *Palko* v. *State of Connecticut*, 302 U.S. 319, 58 S.Ct. 149, 82 L.Ed. 288 (1937). The question to be asked, said the Court, was whether failure to grant due process would violate a *fundamental* principle of liberty which lies at the base of our civil and political institutions: "Does it violate those 'fundamental principles of liberty and justice which lie at the base of all our civil and political institutions?'" 302 U.S. at 328. More recently in *Poe* v. *Ullman*, 367 U.S. 497, 81 S.Ct. 1752, 6 L.Ed.2d 989, (1960), Mr. Justice Harlan in his dissenting opinion carefully reviewed this Court's thinking with respect to the interests protected by Fourteenth Amendment due process. He concluded that the interests protected are those which are *fundamental*; which belong to the citizens of all free governments.

> "However it is not the particular enumeration of rights in the first eight Amendments which spells out the reach of Fourteenth Amendment due process, but rather, as was suggested in another context long before the adoption of that Amendment, those concepts which are considered to embrace those rights 'which are . . . fundamental; which belong . . . to the citizens of all free governments, '*Corfield* v. *Coryell*, 4 Wash. C.C. 371, 380, for 'the purpose [of securing] which men enter into society,' *Calder* v. *Bull*, 3 Dall. 386, 388." 367 U.S. at 541.

Again in *Duncan* v. *Louisiana*, 391 U.S. 145, 88 S.Ct. 1444, 20 L.Ed. 2d 491, (1968), this Court reiterated the standard that an interest is not protected unless it is *fundamental*:

> "The question has been asked whether a right is among those ' "fundamental principles of liberty and justice which lie at the base of all our civil and political institutions," ' *Powell* v. *State of Alabama*, 287 U.S. 45, 67 (1932); whether it is '*basic* in our system of jurisprudence,' in re *Oliver*, 333 U.S. 257, 273 (1948);

> and whether it is 'a fundamental right, essential to a fair trial,' *Gideon* v. *Wainright*, 372 U.S. 335, 343-344 (1963); *Malloy* v. *Hogan*, 379 U.S. 1, 6 (1964); *Pointer* v. *State of Texas*, 380 U.S. 400 (1965)." 391 U.S. at 148-49.

Perhaps most recently this "fundamental" or "implicit-in-the-concept-of-ordered-liberty" analysis was followed in *Roe* v. *Wade*, 410 U.S. 113, 93 S.Ct. 705, 35 L.Ed.2d 147 (1972) where Mr. Justice Blackmun recognized that the interests protected are only those personal rights "that can be deemed 'fundamental' or 'implicit in the concept of ordered liberty', *Palko* v. *Connecticut*, 302 U.S. 319, 325 (1937) . . . ." 410 U.S. at 152.

Education and the financing thereof were considered by this Court in *San Antonio School District* v. *Rodriguez*, 411 U.S. 1, 93 S.Ct. 1278, 36 L.Ed. 2d 16 (1973). There the District Court's finding "that education is a fundamental right or liberty" was expressly rejected. 411 U.S. at 37. While acknowledging that education is of undisputed importance, Mr. Justice Powell was clear that education is neither explicitly nor implicitly afforded protection by the Constitution:

> "Education, of course, is not among the rights afforded explicit protection under our Federal Constitution. Nor do we find any basis for saying that it is implicitly so protected." 411 U.S. at 35.

In arriving at this conclusion, the Court stated one of the basic questions which it had to consider:

> "It is this question—whether education is a fundamental right, in the sense that it is among the rights and liberties protected by the Constitution—which has so consumed the attention of Courts and commentators in recent years." 411 U.S. at 29.

In *Rodriguez* this Court was, of course, faced with questions arising under the Equal Protection Clause. It

nevertheless based its conclusion on precisely the same kind of analysis which this Court has used in determining what interests are protected by the Due Process Clause. Its analysis was directed to the question of whether or not the interest was fundamental, that is, entitled to either explicit or implicit constitutional protection. In agreeing with the majority that it was entitled to neither, Mr. Justice Stewart stated:

> ". . . the Texas system [of financing education] impinges upon no substantive constitutional rights or liberties." 411 U.S. at 62.

The potential significance for due process purposes of this Court's determination that under the Equal Protection Clause education is not a fundamental right explicitly or implicitly protected by the Constitution is underscored by the earlier Supreme Court holding in *Bolling* v. *Sharpe*, 347 U.S. 497, 74 S.Ct. 693, 98 L.Ed. 884 (1954). There the Court was presented with the question of whether its equal protection analysis in *Brown* v. *Board of Education*, 347 U.S. 483, 74 S.Ct. 686, 98 L.Ed. 873 (1954) extended to integration of the District of Columbia Schools. The Court concluded that the concept of liberty within the Due Process Clause of the Fifth Amendment was such that an individual was entitled to be free from segregation on the basis of race in public education. In so doing, the Court declared:

> "But the concepts of equal protection and due process, both stemming from our American ideal of fairness, are not mutually exclusive." 347 U.S. at 499.

Moreover, the analysis of this Court in *Morrisey* v. *Brewer*, 408 U.S. 471, 92 S.Ct. 2593, 33 L.Ed.2d 484 (1972), parallels that employed in the *Rodriguez* opinion. Mr. Chief Justice Burger stated in *Morrisey*: "The question is not merely the 'weight' of the individual's interest, but whether the nature of the interest is one within the con-

templation of the liberty or property language of the Fourteenth Amendment." 408 U.S. at 471. And Mr. Justice Powell in speaking for the Court in *Rodriguez* declared:

> "Thus the key to discovering whether education is 'fundamental' is not to be found in comparisons of the relative societal significance of education as opposed to subsistence or housing. Nor is it to be found by weighing whether education is as important as the right to travel. Rather, the answer lies in assessing whether there is a right to education explicitly or implicitly guaranteed by the Constitution." *Rodriguez*, 411 U.S. at 33-34.

This Court then, both in *Rodriguez, supra,* and in *Morrissey, supra,* looked to the nature rather than to the importance of the interest in question. Further, this Court's analysis in *Rodriguez, supra,* was directed to the question of whether or not a right to education was entitled to either explicit or implicit constitutional protection. The due process cases discussed above looked to the same question. Explicit protections are those guaranteed by the Bill of Rights. They have been selectively incorporated into the Fourteenth Amendment. Implicit protections are those intrinsic to our concept of ordered liberty. In holding that a right to education is not entitled either to explicit or implicit constitutional protection for purposes of the Equal Protection Clause, this Court in *Rodriguez, supra,* undertook the same analysis and answered the very questions raised in the due process cases. Education is undeniably important. This alone, does not entitle it to Constitutional protection.

II. Suspensions Not To Exceed Ten Days Do Not Interfere With Education And The Absence From Classroom Learning Cannot Be Shown To Constitute A Grievous Loss.

Moreover, if this Court were to conclude that education is a fundamental right entitled to the protection of

the Due Process Clause of the Fourteenth Amendment, the statute under attack does not violate the Constitution. The section of the Ohio Revised Code which appellees would strike down, R.C. § 3313.66, expressly limits the length of a suspension to ten (10) days. It requires that notice of the suspension together with the reasons in support thereof be supplied to the parents within twenty-four (24) hours of the suspension. In short, the legislature has assured that the interruption from classroom learning is minimal.

This Court has recently declared that procedural due process does not apply unless it can be shown the individual is condemned to suffer grievous loss. *Morrissey* v. *Brewer*, 408 U.S. 471, 92 S.Ct. 2593, 33 L.Ed.2d 484 (1972). In speaking for the Court, Mr. Chief Justice Burger declared:

> "Whether any procedural protections are due depends on the extent to which an individual will be 'condemned to suffer grievous loss.' *Joint Anti-Fascist Refugee Committee* v. *McGrath*, 341 U.S. 123, 168 (1951) (Frankfurter, J., concurring), quoted in *Goldberg* v. *Kelly*, 397 U.S. 254, 263 (1970)." 408 U.S. at 481.

This language adopted from Mr. Justice Frankfurter's concurring opinion in the *McGrath* case, *supra*, followed his observation that due process is not to be tested by mere abstract generalities. A court must consider all of the relevant interests.

> "The precise nature of the interest that has been adversely affected, the manner in which this was done, the reasons for doing it, the available alternatives to the procedure that was followed, the protection implicit in the office of the functionary whose conduct is challenged, the balance of hurt complained of and good accomplished — these are some of the considerations that must enter into the judicial judgment." *McGrath*, 341 U.S. at 163.

This consideration of all relevant interests would include a recognition of the need for discipline as a part of any properly functioning educational system. It would recognize, as have Ohio's courts, that discipline is very much a part of the system of education devised by Ohio's legislature. Thus, in the context of a suspension for a long-hair violation of a dress code, it was argued by plaintiffs that discipline is no part of the educational process. *Laucher* v. *Simpson*, 28 Ohio App. 2d 195, 276 N.E. 2d 261 (Ct.App. Knox Co., 1971). Plaintiffs made "... a direct challenge to what they chose to describe as 'discipline for the sake of discipline'...". 28 Ohio App. 2d at 197. The court unequivocally declared:

> "Discipline is indeed a part of the educational process and we so hold.
>
> "Our system of public education, established to equip citizens with the skills they need to stay free under a rule of law must, if it is to succeed, thoroughly inform its students that the liberty and rights of all depend upon the willingness of the individual to discipline himself to respect the rights of others and that he learn to subordinate his individual desires when they conflict with the legitimate interests of others. Disciplined respect for the rights of others is essential to the survival of liberty." 28 Ohio App. 2d 198.

This sentiment was echoed by Mr. Justice Black in his dissent in *Tinker* v. *Des Moines Community School District*, 393 U.S. 503, 524, 89 S.Ct. 733, 741, 21 L.Ed.2d 731, 743 (1969):

> "School discipline, like parental discipline, is an integral and important part of training our children to be good citizens—to be better citizens. Here a very small number of students have crisply and summarily refused to obey a school order designed to give pupils who want to learn the opportunity to do so. One does not have to be a prophet or the son of a prophet to

know that after the court's holding today, some students in Iowa schools, and indeed in all schools will be ready, able, and willing to defy their teachers on practically all orders." 393 U.S. at 525.

Both this Court and Ohio's courts have recognized discipline as educational. In view of the short duration of student suspensions under Ohio law and given the purpose and function of those suspensions, it can hardly be claimed that their effect is to "stigmatize" suspended students (*see Roth, supra*, 408 U.S. at 573). Indeed the very hearing which appellees argue for is more likely to cause stigmatization. An examination of the facts in the case at bar confirms the absence of stigma or adverse effect on the appellees. Each of them went on to graduate with his or her class at a grade point average equal to or better than that possessed at the time of suspension. Accordingly, this Court is not dealing with a state-imposed stigma that can be shown to have had an effect on any specific interest of the appellees, such as an interest in preserving their good names or an interest in not having other opportunities foreclosed. In short, even if this Court were to hold that a student does have a due process right to attend the public schools, that right is not implicated by the Ohio Statute.

III. Student Disruptions Create An Emergency In The Educational Process Requiring A Flexible Response From Teachers And School Administrators.

Pursuing further Mr. Justice Frankfurter's analysis, there are additional reasons for concluding that short-term suspensions do not violate due process. One of these is the burden that would be imposed on administrators, teachers and school districts if they were required to provide notice and a hearing before suspension. Amici have described at the outset of this brief the nature of their interest. (pp. 1-2). In particular, reference was made to more than fourteen thousand (14,000) suspensions in the Cleve-

land City Schools during the 1972-73 school year. Requiring notice and a hearing for each of these suspensions would, for all practical purposes, mean the end to short-term suspensions as a disciplinary tool. As Mr. Justice Black's dissent in *Tinker* v. *Des Moines* wisely observed, the students learning they are entitled to prior notice and a hearing are going to defy their teachers with still greater frequency.

The District Court for the Southern District of Florida was presented with a statute similar to Ohio's and it was argued, as in the case at bar, that the statute was unconstitutional because it did not provide for notice or a hearing prior to suspension. The court assumed without discussion that classroom education was an interest protected by due process. It reasoned that a resolution of whether plaintiffs were denied their constitutional rights required a weighing and contrasting of the gravity of those rights with the interest of the state in maintaining discipline in the educational system. *Banks* v. *Board of Public Instruction of Dade County*, 314 F.Supp. 285 (S.D. Fla. 1970), *vacated*, 401 U.S. 988 (1971), *aff'd per curiam*, 450 F.2d 1103 (5th Cir. 1971). The court's careful consideration of the interests involved is set forth at length:

> "Providing a hearing to a student prior to his suspension for misconduct itself produces a disruptive effect upon the educational process. Consider, for example, misconduct which occurs during class. If the misconduct in the teacher's opinion justifies suspension, it would also seem to require that the student be immediately removed from the room as the teacher must be able to continue the teaching process without undue interference. If a hearing is to be held prior to suspension the teacher must leave the room with the student or leave a later scheduled class in order to offer testimony. Those students who were witness to the misconduct must likewise leave the room or spend class time preparing written statements to be pre-

sented at the hearing. If the teacher leaves the room the class in the meantime must be left either without supervision or under the guidance of one who is ill-prepared or needed elsewhere. In any event the likelihood is that the remaining students would suffer in their pursuit of an education.

"If the misconduct should occur in a common area, such as the cafeteria, the hallways, or a recreation area, it is likely that a number of staff and student witnesses must be called out of class to 'testify' at such prior hearing, thus multiplying the disruptive effect on the educational process. The parents, of course, must be notified of the hearing and told to come to the school immediately to confer with their child and help prepare his 'case.'

"If, on the other hand, both student and teacher remain in class following the incident until a later time, perhaps the end of the school day, the authority of the teacher and the respect in which he is held will suffer. Moreover, allowing the student who has misbehaved to remain in class is certain to have a disruptive effect.

"If the hearing is to be held after school, student witnesses must be kept late to testify and the 'offender' will no doubt be conferring with them throughout the remainder of the day both in and out of class in order to prepare for the hearing. Of course, there is the possibility that the teacher might remain in class and just send the student to the principal to be kept in detention until the hearing. But this alternative would prevent the student from conferring with witnesses and preparing his case. It is apparent that providing public school students with hearing prior to suspension would result in a disruption of the educational process which cannot be permitted." 314 F.Supp. at 291-92.

The opinion of the court in *Banks, supra*, makes clear that the holding of a hearing prior to the suspension of a student will have a disruptive effect regardless of the way in which it is done. If the student is allowed to remain

in the classroom until such time as a hearing can be held, the authority of the teacher will be directly undermined. If the student and teacher, in addition to other students and teachers who may have been witnesses, are directly removed from the classroom for purposes of holding a hearing, the educational process for the remaining students will be delayed until such time as the hearing is completed. These facts underscore the confusion of the trial court in the instant matter: virtually all suspension situations may be characterized as "emergencies" for they interfere with the continuation of the educational process.

For this reason, school suspensions necessarily fall within the "emergency" exception to the rule that a prior hearing should be held where due process interests are implicated (*see Bell* v. *Burson*, 402 U.S. 535, 542, 91 S.Ct. 1586, 1591, 29 L.Ed.2d 90, 96 (1971). One case where this exception was applied is *Phillips* v. *Commissioner*, 283 U.S. 589, 515 S.Ct. 608, 75 L.Ed. 1289 (1931). That case involved "the need of the government to promptly secure its revenues" (283 U.S. at 596), and the court concluded that "delay in the judicial determination of property rights is not uncommon where it is essential that governmental needs be *immediately* satisfied." 283 U.S. at 597 (emphasis supplied). As the opinion in *Banks, supra*, so clearly indicates, the importance of removing the disruptive student from the classroom *immediately* cannot be minimized. It is submitted that the interests of schools and students in a continuation of the educational process have an importance at least equal to "the need of the government promptly to secure its revenues."

This is all the more true where, as in the present case, the disruption involves a large number of students affecting the entire school. (In this case, at least 75 students were suspended. See Appellants' Appendix, Vol. 2 of 3, p. 120.) If the school were forced to provide a hearing prior

to the suspension of each student, the only solution available to school officials would be the closing of the schools.

Amici have set forth in Appendix A a number of cases from the federal courts where, without discussion, it is assumed that education is a protected interest under the Due Process Clause and a balancing approach has been employed to determine the absence of need for due process. The balancing approach was also advocated in Buss, *Procedural Due Process for School Discipline: Probing the Constitutional Outline,* 119 U. Pa. L. Rev. 545, 573-77 (1971).

Moreover, practicality is going to require some form of balancing test. For example, why stop with suspension from classroom teaching? Questions will be raised with respect to the need for notice and a hearing prior to the administration of corporal punishment (*Gonyaw* v. *Gray,* 361 F.Supp. 366 [D.Vt. 1973]), or before the exclusion of students from interscholastic sports (*Kelly* v. *Metropolitan County Bd. of Ed. of Nashville, etc.,* 293 F.Supp. 485 [M.D. Tenn. 1968]), or indeed before a pupil may receive a failing grade (*Connelly* v. *University of Vermont and State Agricultural College,* 244 F.Supp. 156 [D.Vt. 1965]). And if these areas are all entitled to due process protection, why isn't a pupil excluded from art, music and drama courses because the school he attends cannot afford the courses entitled to challenge the decision which excludes him? Why doesn't due process entitle him to show his exclusion is the result of an arbitrarily drawn boundary line, which keeps him from attending a school building in the same district where the courses are taught. It was in part for this reason that Mr. Justice Powell in his concurrence in *Cleveland Board of Education* v. *LaFleur,* ..... U.S. ..... , 94 S.Ct. ..... , 39 L.Ed. 2d 52, 69-70 (1974) declared:

> "School boards, confronted with sensitive and widely variable problems of public education, must be

accorded latitude in the operation of school systems and in the adoption of rules and regulations of general application. E. g., *San Antonio Independent School District* v. *Rodriguez*, 411 U.S. 1, 42-43 (1973). A large measure of discretion is essential to the effective discharge of the duties vested in these locals, often elective, governmental units. My concern with the Court's opinion is that, if carried to logical extremes, the emphasis on individualized treatment is at war with this need for discretion. Indeed, stringent insistence on individualized treatment may be quite impractical in a large school district with thousands of teachers."

Likewise, Mr. Justice Black was reluctant to indicate that this Court would inject the federal courts into the public school systems of the various states. *Karr* v. *Schmidt*, 401 U.S. 1201, 91 S.Ct. 592, 27 L.Ed.2d 797 (1971). In pertinent part he stated:

"I refuse to hold for myself that the federal courts have constitutional power to interfere in this way with the public school system operated by the states. And I furthermore refuse to predict that our court will hold they have such power. It is true that we have held that this court does have power under the Fourteenth Amendment to bar state public schools from discriminating against Negro students on account of their race, but we did so by virtue of a direct, positive command in the Fourteenth Amendment, which like the other Civil War Amendments, was primarily designed to outlaw racial discrimination by the states. There is no such direct, positive command about local school rules with reference to the length of hair state school students must have. And I cannot now predict this court will hold that the more or less vague terms of either the Due Process or Equal Protection Clause have robbed the states of their traditionally recognized power to run their school systems in accordance with their own best judgment as to appropriate length of hair for students." 401 U.S. at 1202.

This same reluctance is expressed in *Epperson* v. *Arkansas*, 393 U.S. 97, 104, 89 S.Ct. 266, 270, 21 L.Ed.2d 228, 234 (1968).

Indeed, in *Waugh* v. *Board of Trustees of the University of Mississippi*, 237 U.S. 589, 35 S.Ct. 720, 59 L.Ed. 1131 (1915), students sought the protection of the Fourteenth Amendment for their claimed right to affiliate with a fraternity at an educational institution. A state statute prohibited such fraternities and the court concluded this did not constitute a denial of due process of law. In so doing, the court declared:

> "It is not for us to entertain conjectures in opposition to the views of the State and annul its regulations upon disputable considerations of their wisdom or necessity. Nor can we accommodate the regulations to the assertion of a special purpose by the applying student, varying perhaps with each one and dependent alone upon his promise.
>
> "This being our view of the power of the legislature, we do not enter upon a consideration of the elements of complainant's contention. It is very trite to say that the right to pursue happiness and exercise rights and liberty are subject in some degree to the limitations of the law, and the condition upon which the State of Mississippi offers the complainant free instruction in its University, that while a student there he renounce affiliation with a society which the State considers inimical to discipline, finds no prohibition in the Fourteenth Amendment." 237 U.S. at 597.

The rationale underlying the repeated affirmations by this Court that educational judgments are best left to school officials is based on the expertise of such officials in the education area. Beyond the question of expertise is the need for flexibility in the operation of our public schools. An examination of the statistical breakdown on school suspensions contained in Appendix B underscores

the need for such flexibility. These statistics demonstrate the diversity in age, circumstances, and type of infraction with which school officials must deal. The imposition of a single, constitutionally-mandated procedure would destroy the flexibility needed for dealing with these diverse disciplinary problems. Furthermore, it would preclude the immediate response necessary to prevent the disruption of the educational process.

CONCLUSION

For all of the foregoing reasons *Amici Curiae* respectfully submit that this Court should reverse the judgment of the trial court and enter judgment for appellants upholding the constitutionality of Ohio's suspension statute.

Respectfully submitted,

JOHN F. LEWIS
BRUCE P. JONES
G. CHRISTOPHER MEYER

SQUIRE, SANDERS & DEMPSEY
Cleveland, Ohio

Appendix A — The Federal Courts Have In General Upheld The Constitutionality of Short-Term Suspensions Although Neither Prior Notice Nor Prior Hearing Was Provided. Cases Upholding Suspensions Are Set Forth Chronologically From 1969 Through 1973.

— In *Baker* v. *Downey City Board of Education*, 307 F.Supp. 517 (C.D. Cal. 1969), the constitutionality of a California statute under which a student was suspended for a ten-day period was upheld. In accepting this procedure, the court noted:

"Due process is not a fixed, inflexible procedure which must be accorded in every situation. It varies with the circumstances involved. In the instant case, the school officials were charged with the conduct of the educational program and if the temporary suspension of a high school student could not be accomplished without first preparing specifications of charges, giving notice of hearing, and holding a hearing, or any combination of these procedures, the discipline and ordered conduct of the educational program and the moral atmosphere required by good educational standards, would be difficult to maintain." 307 F.Supp. at 522-23.

— In *Hernandez* v. *School District Number One, Denver, Colorado,* 315 F.Supp. 289 (D.Colo. 1970) the constitutionality of a Colorado statute under which a school principal was authorized to suspend a student for a period up to twenty-five days was challenged. The court rejected this challenge and emphasized the rights of the other students in the educational process:

"There is no evidence that the suspension period of twenty-five days is an unreasonable time to allow the principal and superintendent to attempt to resolve problems of discipline and behavior which is inimicable to the welfare, safety, or morals of other pupils, before resorting to expulsion." 315 F.Supp. at 293-94.

— In *Whitfield* v. *Simpson,* 312 F.Supp. 889 (E.D. Ill. 1970), a student was suspended for two seven-day periods and subsequently expelled. The court upheld the constitutionality of the Illinois statute in question, and noted the importance of discipline both to the functioning of the schools and to the development of the individual student:

"While the principle use to which the schools are dedicated is to accommodate students during prescribed hours for certain types of activities, discipline and social behavior are not only an inevitable part of

the process of schooling, they are also an important part of the educational process." 312 F.Supp. at 893.

— In *Banks* v. *Board of Public Instruction of Dade County*, 314 F.Supp. 285 (S.D. Fla. 1970), *vacated*, 401 U.S. 988 (1971), *aff'd per curiam*, 450 F.2d 1103 (5th Cir. 1971), a ten-day suspension was upheld. There was no hearing before the suspension. In pointing to the context in which due process rights were to be applied, the court stated:

> "The right to a hearing, when analyzed within the setting of the public school system, is necessarily subject to limitations imposed in order to insure the orderly administration of education and to preserve both decorum in the classroom and respect for teachers and administrators." 314 F.Supp. at 291.

— In *Farrell* v. *Joel*, 437 F.2d 160 (2d Cir. 1971), the Second Circuit Court of Appeals upheld a ten-day suspension. The court distinguished a suspension for this duration from both a long-term suspension and from an expulsion in ruling that,

> ". . . the nature of the sanction affects the validity of the procedure used in imposing it." 437 F.2d at 162.

— In *Jackson* v. *Hepinstall*, 328 F.Supp. 1104 (N.D.-N.Y. 1971), the constitutionality of a five-day suspension without prior hearing was challenged. Characterizing five days as a "reasonable suspension period," the District Court made reference to the Supreme Court's decision in *Tinker* in

> "affirming the comprehensive authority of the States and of school officials, consistent with fundamental constitutional safeguards, to prescribe and control conduct in the schools." 328 F.Supp. at 1107.

— In *Tate* v. *Board of Education of Jonesboro, Ark., Special School District*, 453 F.2d 975 (8th Cir. 1972),

students were suspended for a five-day period for walking out of a pep rally. Subsequent to the suspensions, the students were notified of the causes for their suspensions and were given an opportunity to attend a question and answer period relating to the suspensions. In ruling that this procedure satisfied the requirements of due process, the court considered both the "mildness" of the penalty and the need to relate due process requirements to the "time, place and circumstances" of discipline in the schools.

— In *Linwood* v. *Board of Education, City of Peoria, School District No. 150, Illinois,* 463 F.2d 763 (7th Cir. 1972), *cert. denied,* 409 U.S. 1027 (1972), the Seventh Circuit Court of Appeals upheld the constitutionality of a seven-day suspension. In considering the requirements of the Due Process Clause, the court distinguished a school suspension from a criminal proceeding and from a juvenile delinquency proceeding. The court concluded:

> "We are of the view that a suspension for so relatively a short period for reasonably proscribed conduct is a minor disciplinary penalty which the legislature may elect to treat differently from expulsion or prolonged suspension without violating the constitutional right of the student. . . . Certainly, the imposition of disciplinary measures such as after-school detention, restriction to the classroom during free periods, reprimand, or admonition does not *per se* involve matter rising to the dignity of constitutional magnitude. We conclude that insofar as the requirement of a hearing is concerned it was within the discretion of the lawmakers to equate suspensions of 7 days or less with other minor disciplinary penalties although they did reserve the imposition of this particular sanction to school officials of supervisory status." 463 F.2d at 768-69.

— In *Black Coalition* v. *Portland School District No. 1,* 484 F.2d 1040 (9th Cir. 1973), the Ninth Circuit Court of Appeals sustained the validity of temporary suspensions

ranging from six days to six weeks where no prior hearing was held. In its opinion, the court compares the minimal affect on the individual student of such a suspension with the overriding importance to the educational system of maintaining proper order where it states:

> "Brief suspensions are often justified by the interest of school officials in maintaining an atmosphere conducive to learning. The injury caused to assaultive and disruptive students by brief suspensions is minimal compared to the danger posed to the normal functioning of an educational institution by the continued presence of such students." 484 F.2d at 1044.

Appendix B

Summary of Suspensions for the School Year 1972-73

For the Cincinnati City School District

LEVEL	SEX			AGE									GRADE						Insubordination	Behavior Problem	Class Cut & Truancy	Assault	Extortion – Theft	Smoking	Fighting	Miscellaneous	Handled By	
	M	F	Total	10	11	12	13	14	15	16	17	18+	7	8	9	10	11	12									School	Center
Senior																												
September	7	7	14					1	3	5	5					9	3	2	4	1	3	1			5		12	2
October	78	39	117					8	30	37	37	5			16	59	30	12	23	1	28	6	1	20	24	14	107	10
November	82	35	117					5	27	48	29	8			17	60	32	8	23	12	29	15	2	6	16	14	103	14
December	105	37	142						40	56	37	9			8	89	25	20	23	31	44	9	1	7	22	5	126	16
January	94	52	146					9	47	47	33	10			28	71	34	13	28	5	64	6	1	6	19	17	130	16
February	76	48	124					5	33	47	28	11			18	67	28	11	30	4	36	2	1	27	12	12	115	9
March	174	54	228					2	43	68	83	32			15	117	48	48	43	5	91	8	1	32	31	17	214	14
April	95	29	124					7	26	36	35	20			16	58	26	24	34	4	38	3	1	9	19	16	116	8
May	104	44	148					5	35	51	44	13			19	81	34	14	35	9	59	4		16	17	8	143	5
June	16	3	19						3	8	4	4				11	5	3	6	3	4	2		2		2	19	
Sub-Total	831	348	1179					42	287	403	335	112			137	622	265	155	249	75	396	56	8	125	165	105	1085	94
Junior																												
September	55	24	79			4	18	32	21	4			16	30	33				16	6	16	9	8	6	14	4	77	2
October	117	69	186		1	20	53	70	38	3	1		60	76	50				40	18	41	23	2	8	47	7	164	22
November	152	71	223		1	34	61	78	41	7	1		78	70	75				31	14	47	26	2	27	65	11	202	21
December	136	112	248			21	80	99	62	6			61	119	68				70	31	53	10	6	19	52	7	224	24
January	181	102	283			31	79	117	49	7			88	115	80				63	26	54	20	1	22	81	16	251	32
February	253	117	370			26	107	144	80	12	1		129	136	105				93	40	51	21	8	45	97	15	343	27
March	238	131	369			35	83	124	97	28	2		113	128	128				90	38	75	27	3	40	75	21	348	21
May	160	89	249			23	58	97	56	14	1		81	99	69				64	27	49	18	1	27	53	10	236	13
April	266	144	410			23	77	148	112	46	4		104	152	154				104	38	92	26	12	47	66	25	380	30
June	66	46	112			1	23	41	36	10	1		18	56	38				31	7	34	11	1	8	7	13	112	
Sub-Total	1624	905	2529		2	218	639	930	592	137	11		748	981	800				602	245	512	191	44	249	557	129	2337	192
Total	2455	1253	3708		2	218	639	972	879	540	346	112	748	981	937	622	265	155	851	320	908	247	52	374	722	234	3422	286

LEVEL	SEX			AGE									GRADE						Insubordination	Behavior Problem	Class Cut & Truancy	Assault	Extortion – Theft	Smoking	Fighting	Miscellaneous	Handled By	
	M	F	Total	10	11	12	13	14	15	16	17	18+	7	8	9	10	11	12									School	Center
				5	6	7	8	9	10	11	12	13+	1	2	3	4	5	6										
Elementary																												
September	5	1	6						3	2	1					1	2	3	1	3					2		1	5
October	24	2	26		1		3	1	6	6	9		1		3	2	8	12	5	11	5	4			1		2	24
November	28	3	31		2		3	4	6	11	5		2	2	4	4	5	14	4	17	2	5	1		2		13	18
December	18	4	22				2	1	5	8	5	1		1	2		9	10	8	6	1	3		1	3		13	9
January	25	3	28			2	3	5	2	5	9	2		3	3	5	4	13	7	13		4			3	1	8	20
February	23	8	31		1	1	1	2	6	12	7	1	2		1	2	19	7	3	10		3	2		10	3	12	19
March	29	18	47		1	1	1	4	4	11	21	4	2	1	2	3	14	25	9	13		8	1	1	10	5	20	27
April	34	12	46			2		3	10	15	13	3	2		1	5	16	22	6	14	2	9			11	4	27	19
May	45	14	59	1		1	1	3	6	15	23	9	1	2	4	5	15	32	13	27	2	7			10		27	32
June	24	7	31			3		4	3	6	7	8	2	1	3	2	9	14	7	10		7			6	1	23	8
Total	255	72	327	1	5	10	14	27	51	91	100	28	12	10	23	29	101	152	63	124	12	50	4	2	58	14	146	181
Special																												
September			0																									
October	5		5									5						5	3			2					1	4
November	4		4									4						4	2	2								4
December	2		2									2						2		1					1			2
January			0																									
February			0																									
March	2	2	4									4						4	1	2		1					1	3
April	1		1									1						1		1								1
May	2	1	3									3						3		1	1	1					1	2
June			0																									
Total	16	3	19									19						19	6	7	1	4			1		3	16
Grand Total	2726	1328	4054	1	7	228	653	999	930	631	446	159	760	991	860	651	366	326	920	451	921	301	56	376	781	248	3571	483

Statistics compiled by the Cincinnati City School District, Pupil Adjustment Branch, on the basis of suspension notices received by the Clerk-Treasurer of the School District.